

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TOM WOOD DAISSUN, INC. AND
TOM WOOD SUBARU, INC.

and

Case 25--CA--16074

RETAIL, WHOLESALE, DEPARTMENT STORE
UNION, LOCAL 512

DECISION AND ORDER

Upon a charge filed by the Union 13 December 1983, the General Counsel of the National Labor Relations Board issued a complaint 30 December 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 26 August 1983, following a Board election in Case 25--RC--7852, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed. Reg. 45922 (1981); Frontier Hotel, 265 NLRB No. 46 (Nov. 9, 1982).) The complaint further alleges that since 7 October 1983 the Company has refused to bargain with the Union. On 10 January

1984 the Company filed its answer admitting in part and denying in part the allegations in the complaint, and submitting an affirmative defense.¹

On 6 February 1984 the General Counsel filed a motion to strike portions of the Respondent's answer and Motion for Summary Judgment. On 14 February 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Company's answer admits its refusal to bargain, but attacks the validity of the certification on the basis that the Board made an erroneous determination of the challenged ballots in the representation proceeding. The General Counsel argues, and the Company concedes,² that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 25--RC--7852, reveals that an election was held 15 October 1982 pursuant to a Stipulated Election Agreement. The tally of ballots shows that of 15 eligibles voters, 7 cast valid ballots for and 5 against the Union; there were 3 challenged ballots, a sufficient number to affect the results of the election. After conducting a hearing on the challenged ballots, the hearing officer on 7 January 1983 issued his re-

¹ On 27 January 1984 the Regional Director issued an erratum to the complaint.

² In response to the Notice to Show Cause, the Respondent states that it has no objection to the General Counsel's motion to strike certain portions of the Respondent's answer and its affirmative defense. Under these circumstances, we grant the General Counsel's motion and hereby strike the Respondent's denial of pars. 1, 2, and 5 of the complaint and its affirmative defense.

port recommending that two of the challenges be sustained and that one challenge be overruled but not counted as it could not affect the result of the election. The Company filed exceptions to the recommendation. On 26 August 1983 the Board adopted the recommendation and certified the Union as the exclusive bargaining representative of the employees in the stipulated unit.

By letter dated 9 September 1983 the Union requested bargaining with the Company. By letter dated 7 October 1983 the Company acknowledged receipt of the bargaining demand, but refused to bargain until after the Board's decision had been reviewed by the appropriate circuit court of appeals.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.³

³ In requesting summary judgment, the General Counsel acknowledged that there are other complaints and charges pending against the Respondent, but contended, inter alia, that separate processing of this case for summary judgment was warranted. The Respondent filed no objection to the separate processing of this case for summary judgment. Under these circumstances, we find the separate processing of this case from other pending cases involving the Respondent to be warranted.

On the entire record, the Board makes the following

Findings of Fact

1. Jurisdiction

The Company, an Indiana corporation, is engaged in the retail sale and servicing of automobiles at its facility in Indianapolis, Indiana, where it annually purchases and receives goods and materials valued in excess of \$50,000 directly from outside the State. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held 15 October 1982 the Union was certified 26 August 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time salesmen including all finance and insurance salesmen employed by the Employer at its Indianapolis, Indiana Datsun and Subaru facilities; but excluding all office clerical employees and all guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since 9 September 1983 the Union has requested the Company to bargain, and since 7 October 1983 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after 7 October 1983 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Tom Wood Datsun, Inc. and Tom Wood Subaru, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Retail, Wholesale, Department Store Union, Local 512, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time salesmen including all finance and insurance salesmen employed by the Employer at its Indianapolis, Indiana Datsun and Subaru facilities; but excluding all office clerical employees and all guards and supervisors as defined in the Act.

(b) Post at its facility in Indianapolis, Indiana, copies of the attached notice marked "'Appendix.'"⁴ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

⁴ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C.

8 June 1984

Don A. Zimmerman,

Member

Robert P. Hunter,

Member

Patricia Diaz Dennis,

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Retail, Wholesale, Department Store Union, Local 512, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time salesmen including all finance and insurance salesmen employed by the Employer at its Indianapolis, Indiana Datsun and Subaru facilities; but excluding all office clerical employees and all guards and supervisors as defined in the Act.

TOM WOOD DATSUN, INC. AND
TOM WOOD SUBARU, INC.

(Employer)

Dated ----- By -----
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Minton-Capehart Federal Building, Room 238, 575 North Pennsylvania Street, Indianapolis, Indiana 46204, Telephone 317--269--7413.